

111 FERC ¶ 61,354  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher.

San Diego Gas & Electric Co., Complainant                      Docket No. EL00-95-131

v.

Sellers of Energy and Ancillary Services  
Into Markets Operated by the California  
Independent System Operator and the  
California Power Exchange, Respondents.

Investigation of Practices of the California                      Docket No. EL00-98-118  
Independent System Operator and the California  
Power Exchange

California Independent System Operator                      Docket No. ER01-889-016  
Corporation

Mirant California, LLC, Mirant Delta, LLC and                      Docket No. ER01-1455-012  
Mirant Potrero, LLC

California Independent System Operator                      Docket No. ER01-3013-007  
Corporation

California Independent System Operator                      Docket No. ER03-746-004  
Corporation

Public Utilities Commission of the State of                      Docket No. EL02-60-006  
California

v.

Sellers of Long Term Contracts to the California  
Department of Water Resources

Docket No. EL00-95-131, *et al.*

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California Electricity Oversight Board

Docket No. EL02-62-005

v.

Sellers of Energy and Capacity Under Long-Term  
Contracts with the California Department of Water  
Resources

Mirant Americas Energy Marketing, LP,  
Mirant California, LLC, Mirant Delta, LLC, and  
Mirant Potrero, LLC

Docket No. EL03-158-004

Enron Power Marketing, Inc. and Enron Energy  
Services Inc., *et al.*

Docket No. EL03-180-011

Pacific Gas and Electric Company

Docket Nos. ER98-495-020  
ER98-1614-009  
ER98-2145-009  
ER99-3603-002

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER03-215-002

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER04-227-002

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER05-343-003

Southern Company Energy Marketing, Inc. and  
Southern Company Services, Inc.

Docket No. ER97-4166-020

Southern Energy California, L.L.C.

Docket No. ER99-1841-004

Southern Energy Delta, L.L.C.

Docket No. ER99-1842-001

Southern Energy Potrero, L.L.C.

Docket No. ER99-1833-001

Mirant Americas Energy Marketing, LP

Docket No. ER01-1265-006

Mirant California, LLC

Docket No. ER01-1267-007

Mirant Delta, LLC

Docket No. ER01-1270-007

Mirant Potrero, LLC

Docket No. ER01-1278-007

State of California, *ex rel.* Bill Lockyer, Attorney  
General of the State of California

Docket No. EL02-71-006

v.

British Columbia Power Exchange Corp.,  
Coral Power, LLC, Dynegy Power Marketing, Inc.,  
Enron Power Marketing, Inc., Mirant Americas  
Energy Marketing, Inc., Reliant Energy Services,  
Inc., Williams Energy Marketing & Trading, Co.

Puget Sound Energy, Inc.

Docket No. EL01-10-018

v.

All Jurisdictional Sellers of Energy and/or Capacity  
in the Pacific Northwest

Fact-Finding Investigation of Potential  
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-027

Mirant Americas Energy Marketing, Inc.

Docket No. PA03-8-002

Investigation of Anomalous Bidding Behavior  
Docket and Practices in the Western Markets

Docket No. IN03-10-013

## ORDER ON REHEARING

(Issued June 3, 2005)

1. In this order, the Commission addresses requests for rehearing and/or clarification of the Commission's April 13 Order<sup>1</sup> approving a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on

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<sup>1</sup> *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017 (2005) (April 13 Order).

January 31, 2005 in the instant proceedings by the Mirant Parties,<sup>2</sup> the California Parties,<sup>3</sup> and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Participants). The Settlement consists of: a Joint Offer of Settlement; a Joint Explanatory Statement; a Settlement and Release of Claims Agreement; two "wraparound" Power Purchase and Sale Agreements; an Offer of Settlement involving two Reliability Must-Run Service Agreements (RMR Agreements) affecting certain Mirant Delta and Mirant Potrero generating units; and, numerous supporting documents. The Settlement resolves matters and claims raised in proceedings that were initiated with respect to events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period from January 1, 2000 through June 20, 2001 as they relate to Mirant. The Settlement also addresses a number of other dockets pending before the Commission.

2. The Settlement resolves claims by the California Parties against Mirant in Commission Docket Nos. EL00-95-000<sup>4</sup> and EL00-98-000,<sup>5</sup> and in the Docket No.

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<sup>2</sup> The Mirant Parties comprise the following: Mirant Corporation, Mirant Americas, Inc., Mirant Americas Energy Marketing, LP (MAEM), Mirant Americas Energy Marketing Investments, Inc., Mirant Americas Generation, LLC, Mirant California Investments, Inc., Mirant California, LLC, Mirant Delta, LLC (Mirant Delta), Mirant Potrero, LLC (Mirant Potrero), Mirant Special Procurement, Inc., Mirant Services, LLC, and Mirant Americas Development, Inc.

<sup>3</sup> The California Parties comprise: the People of the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (California Attorney General), California Department of Water Resources, acting solely under the authority and powers created in AB1-X, codified in sections 80000 through 80270 thereof and not under its powers and responsibilities with respect to the State Water Resources Department Systems (CERS), the California Energy Oversight Board (CEOB), California Public Utilities Commission (CPUC), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E).

<sup>4</sup> *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange.*

<sup>5</sup> *Investigation of Practices of the California Independent System Operator and the California Power Exchange.* This proceeding and the proceeding in Docket No. EL00-95-000, *et al.*, are collectively referred to as the California Refund Proceeding or the Refund Proceeding.

EL01-10 proceeding. The Settlement also resolves claims against Mirant in Docket Nos. PA02-2, IN03-10, and the Commission's physical withholding investigation, and related appellate proceedings as they relate to Mirant's sales in the CAISO and/or CalPX markets and/or sales to CERS from January 1, 2000 through June 20, 2001 (collectively, the FERC Proceedings). The Settling Participants also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)<sup>6</sup> with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the period from January 1, 2000 through June 20, 2001. The Settlement resolves all claims against Mirant by the Settling Participants and all claims by Mirant against the Settling Participants in the Commission's Gaming Proceeding,<sup>7</sup> the Commission's reliability must run (RMR) proceedings,<sup>8</sup> and the Commission's market based rates proceedings.<sup>9</sup>

3. The Settlement also resolves all claims against Mirant that are based on the factual or legal contentions underlying the appeal to the United States Court of Appeals for the Ninth Circuit in *Lockyer v. FERC*.<sup>10</sup> The Settlement resolves certain litigation matters

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<sup>6</sup> 18 U.S.C. § 824 *et seq.* (2000).

<sup>7</sup> Docket Nos. EL03-158-000 and EL03-180-000. The Settlement provides that it does not affect pending Commission Gaming Proceeding settlements with the Commission's trial staff, consideration paid by Mirant pursuant to those settlements, or preclude any Settling Participant from receiving or advocating an allocation of those settlement proceeds. Settlement Agreement at 5.

<sup>8</sup> *Pacific Gas and Electric Company*, Docket Nos. ER98-495-000, ER98-1614-000, ER98-2145-000 and ER99-3603-000.

<sup>9</sup> Docket Nos. ER97-4166-000, ER99-1841-000, ER99-1842-000, ER99-1833-000 (CAISO's Emergency Motions to Revoke Market Based Rate Authority), and Docket Nos. ER01-1265-000, ER01-1267-000, ER01-1270-000, ER01-1278-000 (Market Based Rate Triennial Updates). The Settlement does not affect any of the Parties' rights and obligations in any proceedings before the Commission pertaining to the Mirant Parties' market based rate authority for transactions outside the Settlement Period. Joint Offer of Settlement at 17.

<sup>10</sup> 383 F.3d 1006 (9<sup>th</sup> Cir. 2004) (*Lockyer Remand Order*).

pending in state and federal courts, pending Commission proceedings,<sup>11</sup> and bankruptcy claims identified in Exhibit D in the Settlement Agreement.

4. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants, and it provides a period of five days following the April 13 Order for parties to make such an election. The following entities have filed with the Commission statements of intention to opt into the Settlement: Aquila Merchant Services, Inc.; Arizona Electric Power Cooperative, Inc.; Arizona Public Service Company and Pinnacle West Capital Corporation (jointly); the California Department of Water Resources (DWR) State Water Project (SWP); Calpine Energy Services, Inc.; Constellation NewEnergy, Inc.; Dynegy Power Marketing, Inc. and certain named affiliates; Enron Power Marketing, Inc.; Illinova Energy Partners Marketing, Inc.; Portland General Electric Company; Puget Sound Energy, Inc.; Salt River Project Agricultural Improvement and Power District; and, Williams Power Company, Inc.

5. The Settling Participants state that those electing not to join will not be affected by the Settlement, but they also point out that they will not share in the benefits of the agreement. The Settlement provides that, by opting into the Settlement, a Settling Participant will receive any refunds and/or offsets against amounts owed under the Allocation Matrix. If a party does not join the Settlement, the Settlement provides that the party can continue to pursue its claims in the Refund Proceeding but it will not receive the benefits of the Settlement. By the same token, Mirant can continue to litigate all issues with respect to non-settling parties. The Settlement provides that non-settling parties will be paid whatever refunds and amounts, if any, that the Commission or the court ultimately determines are due at the termination of the Refund Proceeding.

6. The Settlement requires the approval of the Commission, the CPUC, the Mirant Bankruptcy Court,<sup>12</sup> and the PG&E Bankruptcy Court.<sup>13</sup> Since the April 13 Order, the

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<sup>11</sup> Docket Nos. ER98-495-000, *et al.* and Docket No. EL03-158-000.

<sup>12</sup> Beginning July 14, 2003, Mirant and certain Mirant affiliates commenced proceedings (the Mirant Bankruptcy Proceeding) under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the Mirant Bankruptcy Court).

<sup>13</sup> See PG&E Bankruptcy Plan, In re Pacific Gas and Electric Company, a California corporation, Debtor, Case No. 01-30923 DM, Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Dated July 31, 2003, as Modified by Modifications Dated November 6, 2003 and December 19, 2003.

Mirant Bankruptcy Court and the PG&E Bankruptcy Court have approved the Settlement.<sup>14</sup> CPUC approved it prior to the April 13 Order.<sup>15</sup> The Settlement provides that the Settlement may terminate at the option of any Party upon the occurrence of several events, including rejection of any Mirant Party's plan of reorganization by the Mirant Bankruptcy Court that incorporates a Plan Settlement Solution (as defined in the Settlement), an order of the Mirant Bankruptcy Court denying the Bankruptcy Rule 9019 Motion<sup>16</sup> or if all necessary approvals have not been obtained by March 31, 2006.<sup>17</sup>

## **II. Requests for Rehearing of the April 13 Order**

7. The California RMR Parties<sup>18</sup> filed a timely request for rehearing, challenging the Commission's determination that, because the RMR Initial Decision is only binding upon the Mirant RMR units, and the Settlement resolves all claims with respect to the Mirant Parties that are addressed in the RMR Initial Decision,<sup>19</sup> the issues addressed in the RMR Initial Decision are now moot. Similarly, the Mirant Parties filed a short request for rehearing, asserting that the Commission erred in determining that the RMR Initial Decision was moot. The Mirant Parties claim that the filing of its request for rehearing was made to fulfill the Mirant Parties' obligation under section 8.1 of the Settlement to cooperate with PG&E in seeking a Commission order on the RMR Initial Decision. On May 27, 2005, Calpine Corporation and its wholly-owned subsidiaries Geysers Power Company and Delta Energy Center, LLC (Calpine) filed a motion urging the Commission to dismiss these requests for rehearing summarily, asserting that they are not permitted by the Settlement. Finally, Vernon filed a request for clarification and rehearing, asserting

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<sup>14</sup> The Mirant Bankruptcy Court approved the Mirant Settlement on April 14, 2005. The PG&E Bankruptcy Court approved the Mirant Settlement on April 8, 2005.

<sup>15</sup> Joint Explanatory Statement at 5.

<sup>16</sup> Section 3.2.1 of the Settlement Agreement describes this motion, which the Mirant Parties filed with the Mirant Bankruptcy Court. Among other things, it sought approval of the Settlement.

<sup>17</sup> Joint Explanatory Statement at 22.

<sup>18</sup> The California RMR Parties consist of: CEGB, CAISO, CPUC, SCE, PG&E and SDG&E.

<sup>19</sup> *Pacific Gas and Electric Company*, 91 FERC ¶ 63,008 (2000) (the RMR Initial Decision).

that the April 13 Order was not clear as to the effect of opting into the Settlement vis-à-vis continued litigation in the Refund Proceeding, and once again asserting that the Settlement has a discriminatory impact on Vernon.

**A. The California RMR Parties and the Mirant Parties Requests for Rehearing**

8. One of the proceedings addressed in the Settlement was referred to in the Settlement as the “FERC RMR Proceedings” (referred to herein as the “Mirant RMR proceedings”). In the Mirant RMR proceedings, Docket No. ER98-495-000, *et al.*, the Commission set for hearings certain aspects of the RMR Agreements between PG&E and the Mirant Parties. In the Settlement, PG&E and the Mirant Parties, referring to the RMR Initial Decision, stated that:

The Settlement Agreement settles all claims against the Mirant Parties by PG&E and the other Settling Participants and all claims against the Settling Participants by the Mirant Parties with respect to this proceeding.<sup>[20]</sup>

9. In the Settlement, PG&E and the Mirant Parties also “agree to cooperate to request, promptly after the Settlement Effective Date, that [the Commission] issue an order”<sup>21</sup> in Docket No. ER98-495-000, *et al.*, regarding the RMR Initial Decision. The stated reason for requesting a review of the RMR Initial Decision was that such a Commission order resulting from such a review “is expected to provide important *guidance* on rate methodology for the RMR Agreements.”<sup>22</sup>

10. The Mirant RMR proceedings arose from the decision initially to have the three RMR units that Mirant Delta, LLC and Mirant Potrero, LLC now own to operate under “Condition 1.”<sup>23</sup>

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<sup>20</sup> Joint Explanatory Statement at 12.

<sup>21</sup> Section 8.1 of the Settlement and Release of Claims Agreement.

<sup>22</sup> Joint Explanatory Statement at 12 (emphasis added).

<sup>23</sup> Under the RMR Agreements, an RMR unit owner may operate under Condition 1 or 2. Under Condition 1, the owner of the RMR unit retains all revenues earned in the competitive markets for energy and ancillary services; none of these revenues are credited back to the ISO.

11. In the April 13 Order, the Commission made two findings with respect to the intent to request the Commission to address the RMR Initial Decision. First, the Commission found the Mirant RMR proceedings moot and terminated the dockets in those proceedings.<sup>24</sup> Second, the Commission determined that there was no need to address the RMR Initial Decision for purposes of guidance.<sup>25</sup>

12. In terminating the Mirant RMR proceedings, the Commission found that, because the RMR Initial Decision is only binding upon the Mirant RMR units, and the Settlement resolves all claims with respect to the Mirant Parties that are addressed in the RMR Initial Decision, the issues addressed in the RMR Initial Decision are now moot.<sup>26</sup> In reaching this conclusion, the Commission took into consideration sections 8.1 and 8.2 of the Settlement and Release of Claims Agreement and the First and Second Wraparound

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Under Condition 2, the ISO pays 100 percent of the unit's fixed costs (assuming target availability), and the owner is not allowed to use the unit's capacity in the competitive markets for the owner's benefit. However, when the ISO dispatches the unit for reliability purposes, the owner *must* bid all capacity above that dispatched by the ISO into subsequent energy and ancillary services markets at prices determined by formulas in the contract, and the resulting market revenues are credited to the ISO.

Following the issuance of the RMR Initial Decision, all of the Mirant RMR units opted to operate under Condition 2. As part of the Settlement, the RMR units will begin again to operate under Condition 1, but, as discussed more fully below, Mirant will continue to be compensated by PG&E, as if the units are operating under Condition 2. The Settlement will thus not affect the compensation PG&E currently pays for RMR service from the Mirant Parties.

The three Condition 1 issues set for hearing in the Mirant RMR proceedings were (1) the appropriate level of the Fixed Option Payment under each Revised RMR Rate Schedule, (2) the means of determining the percentage applied to the approved cost of a Capital Item to yield the Surcharge Payment for that item, and (3) the means of determining the percentage applied to the approved cost of a Repair to yield the ISO's Repair Share for that Repair.

<sup>24</sup> April 13 Order, 111 FERC ¶ 61,017 at P 19-20.

<sup>25</sup> *Id.* at P 20.

<sup>26</sup> *Id.* at P 19.

Agreements (Exhibit B of the Settlement), which establish payments Mirant will receive for its RMR units potentially through December 31, 2012.<sup>27</sup>

13. The Commission also declined to issue an advisory opinion based upon the RMR Initial Decision.<sup>28</sup> The Commission reached this conclusion based upon the anticipated change in the use of RMR contracts in the CAISO's revised market structure, and the fact that the record upon which the RMR Initial Decision was based was fact-specific to the Mirant RMR units and was stale.<sup>29</sup>

14. In its request for rehearing, the California RMR Parties argue that the Commission erred both in the Commission's finding that the Settlement renders moot the issues addressed in the RMR Initial Decision and in the Commission's decision not to issue an advisory opinion based on the RMR Initial Decision.

15. We turn first to the issue of mootness. As a preliminary matter, the Commission notes that in the Settlement, no claim was made that live issues would remain in the RMR Initial Decision following issuance of an order approving the Settlement. Indeed, the representation was that "[t]he Settlement Agreement settles all claims against the Mirant Parties by PG&E and the other Settling Participants and all claims against the Settling Participants by the Mirant Parties with respect to [the Mirant RMR proceedings]."<sup>30</sup> Moreover, what PG&E and the Mirant Parties represented that they would ask for is an order addressing the RMR Initial Decision that would be for "guidance" purposes. The very use of the word "guidance" suggests that the parties recognized that no live dispute regarding the RMR Agreements between PG&E and the Mirant Parties would exist following approval of the Settlement and the decision that the parties would request would be an advisory opinion. In the April 13 Order, the Commission stated its intent not to issue an advisory opinion.<sup>31</sup>

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<sup>27</sup> *Id.* at n.38.

<sup>28</sup> *Id.* at P 20.

<sup>29</sup> *Id.*

<sup>30</sup> Joint Explanatory Statement at 12.

<sup>31</sup> April 13 Order, 111 FERC ¶ 61,017 at P 20.

16. The California RMR Parties now argue that there remains an issue concerning the just and reasonable levels of three types of rates (*i.e.*, the fixed option payment factor (FOPF) used to determine the monthly availability payment, the surcharge payment factor and the repair payment factor) applicable to operation of the Mirant RMR units under Condition 1 addressed in the RMR Initial Decision that has not been determined by final Commission order. They allege that, since June 1999, the rates that have been used are interim rates and that, under the terms of the April 1999 Stipulation,<sup>32</sup> those payments are subject to refund or surcharge when a final, lawful rate is set in the Mirant RMR proceedings. They state that the Settlement did not define the rate levels to be followed in the Mirant RMR proceedings or the methodology to be used to define the rate levels, but only settled Mirant's potential refund obligation through 2004.<sup>33</sup> They argue that, without such lawful rates, Mirant will not have lawful payment factors to charge the CAISO under Condition 1 of the RMR Agreements. They add that, because Mirant is collecting fixed option payments and surcharge payments currently for Condition 1 units under interim rates, the CAISO and PG&E may be entitled to refunds of some of these amounts, depending on the final rates.

17. The California RMR Parties further contend that the Wraparound Agreements do not make the Mirant RMR proceedings moot or a decision on the Mirant RMR rates merely advisory. They argue that a rate case under the FPA cannot be declared moot and terminated because the utility subsequently has entered into one or more contracts that generate revenue in addition to the revenue obtained under the RMR Agreements whose rates are at issue in the case. They assert that rate cases become moot either because the parties settle or some event occurs that makes decision on the merits incapable of defining the lawful rights or obligations of the parties under the statute. They claim that Mirant and PG&E expressly did not settle the Mirant RMR proceedings. They add that, although the Wraparound Agreements are related to the RMR Agreements, by determining some prices with respect to payments under the latter and designating the source of capacity and energy supplied as Mirant's RMR units, the Wraparound

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<sup>32</sup> *Citing Stipulation and Agreement*, Docket Nos. ER98-441-000, *et al.*, section II.B.3(b) at 20-21 (Apr. 2, 1999).

<sup>33</sup> On rehearing, the Mirant Parties also argue that the rates Mirant charges under its RMR Agreements are subject to refund pending the outcome of the Mirant RMR proceedings, and, therefore, the issues in those proceedings are not moot. The Mirant Parties contend that the fact that Mirant has entered into the bilateral Wraparound Agreements with PG&E does not make the rates that Mirant is charging under the RMR Agreement final absent a Commission order determining them to be so.

Agreements have no impact on the legal rights or obligations of Mirant, the CAISO or PG&E in relation to the RMR Agreements.

18. The California RMR Parties argue that, even if it were permissible to treat the effect of the Wraparound Agreements as settling issues as to the Mirant Parties in the Mirant RMR Proceedings, the fact remains that the fixed option payment paid by PG&E affects the costs allocable to PG&E's transmission customers. The California RMR Parties claim that the Commission currently treats PG&E's costs associated with the RMR Agreements as transmission expenses, while PG&E's costs associated with the Wraparound Agreements are for capacity and energy and thus will certainly be treated as generation expenses. Therefore, PG&E claims that transmission-only customers will be directly and differentially affected by the outcome in the Mirant RMR proceedings as long as the units in question operate under RMR agreements. They assert that, in order to observe the Commission's long-standing policy that cost causation should be aligned with cost recovery, the Wraparound Agreements cannot justify abandoning the proper allocation between functions of revenues associated with entirely different contracts involving Mirant's RMR units.

### **Commission Determination**

19. Nothing raised by the California RMR Parties warrants granting rehearing of the Commission's finding that the Settlement renders moot the Mirant RMR proceedings. In the Settlement, PG&E and the Mirant Parties "agree that the [RMR Initial Decision] shall have no effect upon any charges, including refunds, under the [RMR] Agreements incurred before January 1, 2005."<sup>34</sup> Through this provision, PG&E and the Mirant Parties have eliminated the need for a final rate determination in the Mirant RMR proceedings. Since the RMR Initial Decision will have no effect on the period at issue in the Mirant RMR proceedings,<sup>35</sup> no refunds for the interim RMR rates paid during that period are necessary.

20. Second, even if the RMR Initial Decision were not limited to the June 1, 1999 to December 31, 2001 time period, PG&E and Mirant have effectively ensured that refunds for Condition 1 operation will not be necessary potentially through 2012. In addition to

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<sup>34</sup> Section 8.1 of the Settlement and Release of Claims Agreement.

<sup>35</sup> The Mirant RMR proceedings addressed a specific time period (*i.e.*, rates paid for RMR service from June 1, 1999, the effective date of the April 1999 Stipulation, through December 31, 2001, the end of the so-call "rate freeze period."). *See* April 1999 Stipulation, Exh. JT-1, Docket No. ER98-495, *et al.*

limiting the effect of the RMR Initial Decision on any charges, including refunds, incurred before January 1, 2005,<sup>36</sup> in the Wraparound Agreements, PG&E and the Mirant Parties agreed that, as of January 1, 2005, PG&E will pay the Mirant Parties Condition 2 rates, even though the Mirant RMR units would operate under Condition 1. In fact, section 12 of the Wraparound Agreements specifically states that:

[f]or the avoidance of doubt, the intent of the parties is for [Mirant] to be compensated for the RMR Units by [PG&E,] subject to the rates discussed herein, as if Mirant had elected “Condition 2” under the RMR Agreements for all purposes.

Therefore, the Commission’s review of the rates included in the Wraparound Agreements indicates that, even though Condition 1 rates are mentioned, the rates that PG&E will pay Mirant are the Condition 2 rates. The Condition 1 rates will be charged and credited back, and, as such, the need for final Condition 1 rates does not exist under the approved Wraparound Agreements. This result is reasonable given the particular circumstances here. First, Mirant is requesting a finding regarding rates that would be effective from January 1, 2005 forward. The Commission has previously noted concerns over the staleness of the record from the RMR Initial Decision. Thus, to determine just and reasonable rates effective from January 1, 2005 forward, the Commission would have to institute an investigation under section 206 of the FPA. However, because under the construct of the Settlement, the Condition 1 rates determined by the Commission would be charged and then credited back (thus, having no revenue impact), the need for final, adjudicated Condition 1 rates that would no longer be subject to refund is not present. We also reiterate that the Mirant RMR proceedings were not generic proceedings with final rates that would be applicable to other parties.

21. Consequently, the parties can continue to operate under the interim rates in the April 1999 Stipulation. When the Wraparound Agreements cease to be in effect and, as a result, a rate determination may be needed (which may be as late as 2012), the parties may then seek a determination from the Commission based upon then-current costs, revenues, operating characteristics and other unit specific information. Since PG&E and Mirant have provided explicitly a statement of intent so as to leave no doubt in the Wraparound Agreements as to the RMR rates that will be charged, that information is also applicable to the CAISO.

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<sup>36</sup> Section 8.1 of the Settlement and Release of Claims Agreement.

22. Finally, the Commission finds unconvincing the California RMR Parties' argument that the Commission must address the RMR Initial Decision because the Commission will certainly allocate the costs of the Wraparound Agreements differently from how it allocates the costs associated with the RMR agreements. How the Commission allocates the costs of the Wraparound Agreements is properly the subject of a different proceeding and, in any event, has no effect on what PG&E pays the Mirant Parties under the RMR Agreements, which was the subject matter of the Mirant RMR proceedings.

23. Therefore, because the Settlement eliminates the effect of the RMR Initial Decision on the charges, including refunds, paid during the time period at issue in the Mirant RMR proceedings, the Commission finds that the issues presented in the Mirant RMR proceedings are no longer "live" and that the parties to those proceedings lack a legally cognizable interest in the outcome.<sup>37</sup>

24. To the extent that the California RMR Parties argue that the RMR Initial Decision was generic in scope and thus cannot be considered moot because the Settlement did not address the rights of other parties, we note that the RMR Initial Decision was based upon the facts and circumstances of the RMR contracts at issue in those proceedings. The Commission never intended that generic Commission policy concerning RMR issues was to be set in those proceedings. The RMR Initial Decision is simply immaterial to Mirant RMR contracts executed after December 31, 2001 and to any other RMR contract; the RMR Initial Decision contains no live issues for entities outside of that proceeding. Finally, the Wraparound Agreements eliminate the relevance of the Condition 1 rate issues related to the Mirant RMR units for the foreseeable future. Accordingly, the Commission finds that the California RMR Parties have raised nothing on rehearing to change its decision to terminate the dockets in the Mirant RMR proceedings because the Settlement renders moot the Mirant RMR proceedings.

25. To the extent that the California RMR Parties also argue that the Commission should nevertheless issue an advisory opinion, the Commission sees no merit to those arguments. The California RMR Parties suggest that the current RMR structure will exist in California for the foreseeable future; in this regard, the California RMR Parties suggest that the Commission was wrong in stating that the use of RMR contracts in California would change in the future. But as we stated above, there are no remaining issues concerning what PG&E will pay for Mirant's RMR service in the foreseeable future; and the Mirant RMR proceedings were not intended to set generic policy. Accordingly, we

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<sup>37</sup> See *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969).

deny rehearing.<sup>38</sup>

**B. Vernon's Request for Clarification and Rehearing**

26. In approving the Settlement, the Commission found that the Settlement is not unduly discriminatory, and that it provides measures to ensure that any shortfalls in refunds would not be borne by non-settling participants.<sup>39</sup> Article VI of the Settlement allocates the risk of shortfalls so that non-settling participants will not have to bear the risk, but that the risk will instead be borne by specific parties to the Settlement.

27. On rehearing, Vernon asserts that the Commission's order was not sufficiently clear on the allocation of responsibility for shortfalls. Thus, Vernon seeks clarification that the California Parties have an obligation to make up to the non-settling participants any increase in shortfalls that results from "third parties not paying their obligations in full under a final settlement of accounts, and that ... California Parties will be ordered to make appropriate payments to [non-settling participants] ... ." <sup>40</sup>

28. Vernon also seeks clarification or rehearing to the effect that the data and analyses in its hypothetical scenarios "demonstrate unequivocally" that for the post-January 2001 refund period, Vernon would have "substantial refunds" while under the Settlement, Vernon would receive "zero refunds."<sup>41</sup> The upshot of this determination would be that the Settlement discriminates against non-settling participants.<sup>42</sup> In this vein, Vernon continues to press its claim that the refund allocation methodology in the Settlement discriminates against parties like Vernon, which was a net seller in the CalPX market but was a net purchaser in the CAISO market.<sup>43</sup> Vernon seems to argue that unless the

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<sup>38</sup> Because the Commission is denying the rehearing requests of the California RMR Parties and the Mirant Parties, it is not necessary to rule on Calpine's motion to dismiss these rehearing requests.

<sup>39</sup> "Non-Settling Participants" is a term defined in Section 1.1.89 of the Mirant Settlement as "Market Participants that are not Parties, and that do not elect to become bound by this Agreement in order to participate in the Settlement pursuant to Article XI."

<sup>40</sup> Vernon Rehearing Request at 5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 6.

Commission guarantees that it will do better under the Settlement than it will by continuing to litigate, the Settlement discriminates against non-settling participants:

Vernon understands the Commission to rule that, regardless of any unfairness of the settlement to Vernon and whether or not settlement terms would make any sense whatsoever for Vernon to become a party to, so long as the settlement preserves and is not detrimental to Vernon's rights to continue to litigate, Vernon has no complaint as to a settlement entered into by other parties.<sup>44</sup>

Vernon also takes umbrage that Commission found its hypothetical scenarios unpersuasive. In comments on the Settlement, Vernon utilized data it claims to have derived from the CAISO's rerun calculations to create hypothetical scenarios involving certain unidentified California parties, five "sellers" and Vernon. The three hypothetical scenarios presented by Vernon are based upon assumptions about the refund liability of certain of the unidentified California parties and the sellers and purport to demonstrate that non-settling participants would bear a disproportionate burden if one of the sellers did not pay what it owed the market as a result of the CAISO's refund calculations. In a footnote, Vernon states that the Commission's determination that these hypothetical scenarios are "based on speculative behavior and not probative" is "clear error."<sup>45</sup>

### **Commission Determination**

29. With respect to Vernon's request that the Commission clarify its determination as to how the Settlement allocates the risk of shortfalls and the risk of non-payment by third parties, the Commission reiterates that the Settlement contains ample protection for non-settling participants against the risk of shortfalls, including those that occur because third parties have not paid amounts shown to be owing under the Allocation Matrix in Exhibit F to the Settlement. Article VI of the Settlement provides that, depending upon when those shortfalls occur, the California Parties, MAEM or CERS will bear this risk.<sup>46</sup> No further clarification is necessary.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 5 (*citing* April 13 Order, 111 FERC ¶ 61,017 at P 64).

<sup>46</sup> Under Article VI, the risk of shortfalls for the Pre-October Period are allocated to MAEM; the California Parties bear the risk of shortfalls for the Pre-January 18 Period; and, CERS bears the risk of shortfalls for the Post-January 17 Period.

30. The Commission denies rehearing with respect to its finding that the Settlement is not unduly discriminatory. The Settlement provides an opportunity for all participants to opt-in and would provide significant benefits, including certainty and finality on major issues, to the settling participants.<sup>47</sup> The Settlement anticipates that some parties will choose to continue to litigate rather than join the Settlement, and the settling participants have agreed to share the risk of shortfalls in the refund process. “The Settlement will not reduce in any way the amount of refunds the Commission ultimately determines are due to [non-settling participants].”<sup>48</sup> The Commission reiterates its finding in the April 13 Order that these measures will protect non-settling participants from underrecovery and evince an effort to ensure that the Settlement does not discriminate against non-settling participants.

31. Having reviewed Vernon’s hypothetical scenarios again, the Commission continues to find that they are not probative nor do they support Vernon’s claim that the Settlement discriminates against parties such as Vernon. Vernon’s hypothetical scenarios are based upon assumptions that may not reflect reality. Vernon applies those assumptions to unidentified California Parties and shippers and concludes that non-settling participants will be disadvantaged by opting into the Settlement as compared to their potential recoveries should they pursue continued litigation.<sup>49</sup> While it is possible that not all parties will pay their obligations under a final settlement of accounts, the risk of shortfalls has been allocated so that non-settling participants will not be disadvantaged. Thus, nothing Vernon has filed on rehearing alters the Commission’s conclusion that Vernon’s hypothetical scenarios are based on speculative behavior and not probative. As the Commission stated in the April 13 Order, the decision to opt into this or any other settlement will depend on a party’s individualized assessment of the benefits of the

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<sup>47</sup> As defined in sections 1.1.2 and 1.1.132 of the Settlement, “settling participants” are the California Parties and any additional settling participant that has elected to be bound by the Settlement Agreement in order to participate in the Settlement.

<sup>48</sup> Joint Explanatory Statement at 7.

<sup>49</sup> Vernon’s focus on its hypothetical scenarios ignores the fact that three other similarly situated market participants, SWP, Dynegy and Enron, have chosen to opt into the Settlement instead of continuing to litigate their claims in the Refund Proceeding. A cursory examination of these companies in the Allocation Matrix (Exhibit F of the Settlement) reveals refund profiles that are similar to Vernon’s. Thus, at least three companies with similar refund exposure under the Allocation Matrix have chosen to opt into the Settlement.

settlement (*e.g.*, certainty) versus the potential recovery from pursuing individual claims through continued litigation. For these reasons, the Commission denies Vernon's request for rehearing.

The Commission orders:

(A) The requests for rehearing are denied, as discussed in the body of this order.

(B) Vernon's request for clarification is granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.